No. 15323

United States
Court of Appeals
For the Ninth Circuit

FLOYD SMITH,

Appellant,

vs.

KENNETH BUCK and KENNETH BINDER,

Appellees.

Appellant's Brief

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Appellant's Brief

Appeal from the United States District Court for the District of Oregon

JURISDICTION

Appellant is a citizen of the State of Washington and appellees are the citizens of the State of Oregon. (Tr. of R. p. 4)

The cause of action is one for personal injury and the amount of damage claimed exceeds the sum of $3,000.00 exclusive of interest and costs. (Tr. of R. p. 4)

The United States District Court had jurisdiction in this cause by virtue of Title 28, Sec. 1[illegible]332, Subsection (a), (1), which reads as follows:

> "(a) The District Court shall have original jurisdiction in all civil actions where the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs, and is between:
> (1) Citizens of different states:"

This Court has appellate jurisdiction by virtue of Title 28, Sec. 12 91 U. S. C. A., which reads as follows:

> "This court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . "

STATEMENT OF THE CASE

Appellant brought action for personal injuries sustained when struck by a trailer being pulled by a truck owned by appellee Binder and driven by appellee Buck.

At the conclusion of appellant's case in brief, the court dismissed appellant's cause and the jury upon the ground that no negligence had been shown. (Tr. of R. p. 52)

The accident occurred on October 31, 1955 in the State of Oregon on U.S. Highway No. 26 approximately six miles east of the town of Government Camp on the slopes of Mt. Hood. (Tr. of R. p. 4)

It was snowing and the road was slick. (Tr. of R. p. 16) Plaintiff had been driving east in his passenger

automobile when he could proceed no further because of lack of traction. He brought his car to a halt within three or four feet of the steel guard rail upon his side of the road and was engaged in putting a chain upon the left rear wheel of his vehicle when he heard the roar of a truck, jumped to his feet and was struck by defendant's trailer. (Tr. of R. p. 16, 18, p. 28)

At the place where the accident occurred the roadbed was deeply banked down towards plaintiff. (Tr. of R. p. 51) Directly across the road from plaintiff, at a distance of approximately 15 feet according to appellee Buck (Tr. of R. p. 46) and 30 to 40 feet according to the appellant, (Tr. of R. p. 20) there was another similarly disabled passenger automobile. There were also a number of other vehicles stopped and stalled in the immediate vicinity upon either side of the road. (Tr. of R. p. 44)

Appellee Buck was likewise traveling east. He was driving a Frehoff truck and trailer unit used for the handling of wheat of an overall length of 60 feet. (Tr. of R. p. 41) He attempted to negotiate the passage between appellant and the vehicle across from him, passing his truck within five or six feet of appellant. (Tr. of R. p. 50) Appellant was struck and injured by appellee's trailer when the rear thereof slid sideways down the intervening distance as it passed him. (Tr. of R. p. 43)

SPECIFICATION OF ERROR No. 1

The Court erred in dismissing plaintiff's cause and the jury.

SUMMARY

The trial court ruled that as a matter of law appellees were not negligent. For the purpose of this appeal appellant need only establish that there was sufficient evidence submitted to support a jury verdict in his favor. The Argument sets forth this evidence, together with analogous cases.

FIRST POINT AND AUTHORITIES

There was sufficient evidence of appellee's negligence to require that appellant's cause be submitted to the jury.

Deyo v. Detroit Creamery Co., 257 Mich. 77; 241 N. W. 244,

Thomas v. Shippers Express & Warehouse, 158 Southern 859,

W. W. Pickle & Canning Co. v. Baskin, 236 Ala. 168; 181 Southern 765,

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Blashfield, Cyclopedia of Automobile Law, Vol. 1, Sec. 749.

ARGUMENT

Appellee Buck was traveling into a mountainous area on the last day of the month of October. It had been snowing for the past 36 miles as he had been traveling to the height at which the accident occurred. (Tr. of R. p. 49) Three hundred feet prior to the accident, he was aware of traffic congestion caused by the slickness of the road. (Tr. of R. p. 48) He continued to travel over a curved road so congested with stalled vehicles that he could not see appellant until he was within 100 feet of him. (Tr. of R. p. 44) He viewed the space between appellant and the vehicle across the road from him as approximately 15 feet. (Tr. of R. p. 46) He was traveling between 15 to 18 miles per hour according to his own testimony (Tr. of R. p. 47); 20 to 25 miles per hour according to the witness Moore. (Tr. of R. p. 31) He had no chains on. (Tr. of R. p. 48). He was aware of the steep grade of the bank of the road from his left to right down towards appellant before he attempted to pass between appellant and the car across from him. (Tr. of R. p. 51) He was aware that his trailer was so attached as to permit it to swing from right to left. (Tr. of R. p. 42) He started to pass between appel-

lant and the car across from his at a distance of only five feet away from appellant. (Tr. of R. p. 50) He could have stopped before he attempted the passage. (Tr. of R. p. 48) The accident occurred, in his own words, when his trailer slid down the "super" by gravity. (Tr. of R. p. 50) It would not have so slid, he testified, if he had been going faster. (Tr. of R. p. 46) There was no testimony that at any time he sounded his horn.

Reduced to simple statement: appellee Buck failed to maintain control of his trailer. With reason to anticipate this, he gave himself but a margin of five feet in the initial instance by which to avoid injury.

In **Deyo v. Detroit Creamery Co.,** 257 Mich. 77; (241 N. W. 244), defendant's truck, hauling two trailers, was being driven upon an icy street so "crowned" as to be two inches higher in the center than at the curb. Plaintiff, a small boy, stepped off of the curb and in this position stopped to wait for defendant's truck and trailers, that were approaching from his left, to pass. There was an automobile parked at the curb approximately 20 feet to the boy's right. The truck turned to avoid the car and the second trailer being hauled skidded into the boy.

The Court states at page 83:

> "A driver may be negligent in driving at a rate of speed not in excess of the limit fixed by statute . . .

Defendant further claims that the mere skidding of the trailer does not constitute negligence. It became a question for the jury to determine whether defendant's driver drove in a safe manner on a crowned road covered with ice, and also whether he made a sudden turn of the truck so as to cause the trailer to skid and injure plaintiff. It did not require expert testimony to show what is in everyone's knowledge: that one is apt to slide or skid on a slippery pavement and particularly so when making a sharp turn with a vehicle. The testimony does not show that a skidding was unpreventable . . . The facts in the case presented a question for the jury, and the verdict is supported by proper testimony."

In **W. W. Pickle & Canning Co. v. Baskin,** 236 Ala. 168; (181 S. 765) plaintiff's intestate was walking on a path beside the road in the same direction as defendant's truck and trailer was traveling. A similarly large size vehicle was coming towards them. When approximately 50 to 70 feet from the decedent, defendant pulled his truck to the right to pass the oncoming vehicle. After he had done so he pulled back towards the center of the road. In the course of this latter movement, the trailer swerved out of line and struck and killed plaintiff's decedent.

The Court states as follows upon page 170:

". . . we conclude from the record that it is a reasonable explanation of the accident that plaintiff's intestate was struck by the trailer, which doubtless

swerved to some extent, as the driver righted the truck upon the road after thus passing the other truck."

". . . The jury were authorized to find from the evidence that the driver of the truck was negligent in driving in such close proximity to plaintiff's intestate, and in not taking proper precautions to avoid striking him with any part of the truck or trailer and that he was likewise guilty of negligence in admittedly failing to give him any warning of the approach of the truck."

In **Cook v. Miller Transportation Co. Inc.,** 319 Pa. 85; (179 Atlantic 429), defendants were driving their truck and trailer down an icy, slushy street towards an intersection. Plaintiff was a boy standing some four feet from the curb, who had stepped out from the sidewalk and had then stopped to wait for the truck and trailer to pass. To avoid a vehicle approaching from its left, the truck swerved to the right passing between approximately five feet of the boy. The rear wheels of the trailer "either swerved or skidded" towards the latter and ran over his foot.

The Court quotes with approval from the opinion of the trial court upon page 87 as follows:

". . . 'The jury would be fully justified in finding that the driver of defendants' truck was negligent. The minor plaintiff was in full sight under an electric light . . . To drive a 35-foot trailer-truck at 28 to 30 miles an hour on a slippery street in

close proximity to a standing child, with a resulting swerve or skid so that the child is injured, may well be deemed negligence.' "

As the cases hereinabove cited, as well as the cases to be cited hereafter, illustrate, the fact that defendant is pulling a trailer is a disinguishing feature. Its free swinging hitch gives it road characteristics differing from those of an automobile or truck; characteristics that must be considered by the driver if he is to exercise due care in maintaining control of it.

In **White v. Kretz Bros.,** 122 Cal. App. 197 (10 P. 2nd 198), a truck and trailer being driven by the defendant in the center of the road approached plaintiff's vehicle traveling in the opposite direction. The driver of the truck and trailer swerved his truck to the right which caused the trailer to whip further over to the left. The Court states upon page 200:

"A statement of these facts is sufficient to demonstrate negligence of appellants, which was the proximate cause of the accident, and the lack of contributory negligence on the part of respondents."

In **Commercial Carriers v. Small,** 277 Ky. 189; (126 S. W. 2d 143), the automobile in which plaintiff was riding, and defendants' truck and trailer, each approached a bridge, 16 feet wide between the curbings, from opposite ends. The defendant's truck proceeded

first and swinging to the center of the road, crossed over the bridge. In swinging back to the right hand side of the road at the far end, the trailer swung to the left, hitting the car in which plaintiff was riding.

The Court states upon page 193:

> "While the general standard of diligence of a driver of an automobile is always said to be ordinary care, one driving a large machine eight feet wide—nearly 3 feet wider than the usual passenger car—must take that fact into consideration as he endeavors to exercise ordinary care in its operation."

In **Thomas v. Shippers Express & Warehouse Co., Inc.,** 158 So. 859 (La.), plaintiff was walking along the right hand side of a ramp leading up to a bridge and defendant's truck and trailer were coming off the bridge towards him. The truck swerved to the right and a "side motion" was given to the trailer, causing the rear wheels to fall into a hole in the road casing the trailer in turn to jolt off the road into plaintiff.

The Court states upon page 869:

> "Plaintiff was where he had a right to be . . . The trailer attached to defendant's truck were unloaded and, consequently, much more given to side sway than if heavily loaded with bales of cotton."
>
> ". . . We conclude, therefore, that the injury was caused solely by the negligence of defendant's

employee in improperly handling his vehicle under the circumstances, by permitting the second trailer to swerve off the road and on to the gravel path, thus causing the injury complained of."

In **Blashfield, Cyclopedia of Automobile Law and Practice,** Sec. 749 p. 480, Vol. 1, part 2, states as follows:

"It is frequently said that the mere skidding of an automobile, alone and unexplained, does not import, indicate, or establish negligence, and furnishes no evidence in driving at an excessive speed . . ."

"The fact, however, that the automobile skidded is not necessarily any defense to the motorist.

"Taken together with acts or omissions of the motorist, skidding may occur in such circumstances as to warrant a finding of negligence. 'Nineteen out of twenty skids' it has been said, 'could have been avoided if the driver had used better judgment.' If it may be found that due care would have avoided the skidding, the motorist's liability follows . . ."

The same author, Volume 2, Sec. 827, page 11, states:

"Chains. The absence of chains, at the time of an automobile accident through skidding, may constitute actionable negligence, although ordinarily the mere failure to have chains will not be negligence as a matter of law.

* * * *

> "In any event, a motorist, in operating his machine without chains on a slippery street, in determining what is a proper rate of speed for him to go, must consider that he cannot stop as quickly without chains as with."

Appellant will not belabor the point. Based upon the foregoing authority appellant contends that it cannot be said as a matter of law that appellees drove this truck and trailer with due care.

Given the facts at hand, the road congested with stalled vehicles, the trailer free to swing, the steep slope down towards appellant, the small space between appellant and the truck to start with, a jury could and should find that appellant's injury was foreseeable and avoidable and due to appellee's negligence.

Respectfully submitted,

/s/ DAVID M. SPIEGEL,

Attorney for Appellant.